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Office of the Secretary
Federal Communications Commission
1919 M. Street, N.W., Room 222
Washington, D.C. 20554

Re: Matter of Amendment of the Commission's Rules
and Policies Governing Pole Attachments
Docket No. 97-151

To Whom It May Concern:

Enclosed for filing are the original and 12 copies of the Comments of the New York State Investor Owned Electric Utilities submitted in response to the Notice of Proposed Rule Making issued August 12, 1997 in the referenced proceeding.

Also enclosed is a copy of the foregoing document and a self-addressed, stamped envelope. Kindly date stamp this copy and return it to me in the envelope provided. Thank you for your cooperation.

Very truly yours,

Martin F. Heslin

Enclosures

c. Larry Walke
Cable Services Bureau

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

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SEP 26 1997
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In the Matter of :
: CC Docket No. 97-151
Implementation of Section 703(e) :
of the Telecommunications Act of 1996 :
:
Amendment of the Commission's Rules :
and Policies Governing Pole Attachments :
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**COMMENTS OF THE NEW YORK STATE
INVESTOR OWNED ELECTRIC UTILITIES**

Respectfully submitted,

Consolidated Edison Company of New York, Inc.;

Central Hudson Gas & Electric Corporation

Long Island Lighting Company,

New York State Electric & Gas Corporation;

Niagara Mohawk Power Corporation;

Orange and Rockland Utilities, Inc.;

Rochester Gas and Electric Corporation

by:

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**COMMENTS OF THE NEW YORK STATE
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I. Introduction

Consolidated Edison Company of New York, Inc.; Central Hudson Gas & Electric Corporation; Long Island Lighting Company, New York State Electric & Gas Corporation; Niagara Mohawk Power Corporation; Orange and Rockland Utilities, Inc.; and Rochester Gas and Electric Corporation ("New York Electric Utilities" or "NYEU") submit these comments in response to the Notice of Proposed Rule Making ("NPRM") issued by Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding on August 12, 1997. The NPRM seeks comment on the implementation of a methodology to establish maximum just and reasonable rates utilities may charge to telecommunications carriers for pole attachments and the use of conduit space. Section 224 (e) of the Communications Act of 1934 ("Communications Act"), as amended by the section 703 of the Telecommunications Act of 1996, provides a formula for a pole attachment and conduit use rate to become effective in 2001 for attachments by telecommunication carriers

(“telecommunications rate”).¹ The NPRM sets forth the Commission’s proposed methodology for implementing that formula.

The New York Electric Utilities are investor-owned electric utilities that provide generation, transmission, distribution, and sale of electricity for millions of residential, commercial and industrial customers throughout most of New York State. The individual NYEU members each operate electric distribution systems that collectively use millions of wooden poles to support hundreds of thousands of miles of overhead electric wires.

The State of New York has chosen to exercise its authority to regulate pole attachments involving cable television services and telecommunication carriers, and the New York State Public Service Commission (“NYPSC”) has certified to the FCC its intention to regulate the rates, terms, and conditions for pole attachments as provided in Section 224 (c) of the Communications Act. Recently, in Case 95-C-0341, the NYPSC reaffirmed its jurisdiction over pole attachment rates, terms, and conditions but, citing the need to “eliminat[e] unnecessary variation in regulatory requirements” from state to state, the NYPSC announced that it “will use the federal approach as our model for setting pole attachment rates and for regulating pole attachment operations in New York.” Case 95-C-0341, Opinion No. 97-10, Opinion and Order Setting Pole Attachment Rates, issued June 17, 1997.

The New York Electric Utilities are pleased to offer these comments. Because the NYPSC has decided to follow the federal approach to pole attachment rates and

¹ Section 224 (d)(3) provides that the current rate formula in effect for pole attachments will be applicable beginning in February 2001 only to attachments used solely to provide cable service (“cable rate”).

operations, the rules, policies, and models established by the FCC will significantly affect pole attachment rates and operations in New York State.

II. Summary of Comments

A. Preference For Negotiated Agreements

Market rates freely negotiated between pole owners and parties seeking to attach is the best way to effectuate the Telecommunication Act's goal of encouraging competition through reliance on market forces. The rigid, formulaic approach to "maximum" attachment rates proposed by the Commission effectively precludes the meaningful negotiations that Congress intended. The Commission's final rules should unequivocally assert Congress' intent that parties must negotiate the rates, terms, and conditions for pole attachments.

B. Overlashing and Dark Fiber

Telecommunication carriers should be permitted to overlash their existing licensed attachment with additional fiber or copper cable. However, the carrier must provide the utility-pole owner with reasonable advance notice of its intent to overlash and cooperate with the utility's reasonable engineering requirements related to the additional burden on the pole and appropriate make-ready work. If one party owns the entire overlash bundle, it should pay a single attachment rate for the entire bundled overlash, but overlash by a telecommunications line over a cable television service line, or vice versa, would require that the telecommunications attachment rate be applicable.

Because overlash promotes telecommunications competition, third parties (i.e., entities that do not have a pole attachment agreement with a utility) should be permitted to

overlash to an existing licensed attachment. However, as with an overlash by a existing attacher, the utility should receive advance notice of an overlash by a third party, and the existing attacher and the overlashing party must cooperate with the utility in addressing engineering concerns. A third party that overlashes on an existing attachment should be required to pay a full attachment rate because the overlashing party burdens the pole, places administrative burden on the utility, and receives the full benefits of an attachment. It should not gain a competitive advantage by avoiding the attachment rate paid by other attachers.

An entity that has communications fiber attached to a pole or conduit should have the right to lease or license the use of such fiber to a third party without having to pay an additional attachment charge, and the third party lessee's should have the right to use the fiber without having to pay an attachment charge. The lessee's use of the leased dark fiber for telecommunications service would require that the telecommunications attachment rate be charged for the lessor's attachment even if the lessor used remainder of the fibers for cable television services only.

C. Pole Height and Usable Space Presumption

The FCC should continue its presumption -- derived from the use of 35 and 40 foot poles for attachments -- that the average pole height is 37.5 feet. In determining the usable space on a pole, the FCC should adjust its current presumptions of 11 feet of usable space on a 35 foot pole and 16 feet of usable space on a 40 foot pole by excluding 30 inches of the 40 inch safety space that is included in the FCC's current usable space presumption. The FCC's traditional rationale for considering safety space to be usable space is not applicable under the Telecommunications Act of 1996. Thirty inches of safety

space should be allocated to attaching parties as unusable space, and the remaining 10 inches of safety space should be usable space chargeable to the electric utility.

D. Allocating The Cost Of Other Than Usable Space

Unless the utility provides communication services, the utility should not be considered to be an attaching entity for purposes of apportioning unusable space costs. LEC's are not attaching entities, and should not be allocated the costs of the two-thirds portion of unusable space. Governmental agencies, that are not providing "telecommunications services," are not "attaching entities," and should not be apportioned unusable space costs. All attaching entities benefit equally from the unusable space portions of the pole they occupy. Unusable space costs should be allocated equally among all "attaching parties" and not on the basis of the space required by each attachment.

NYEU support the use of a presumptive average number of attachers to a pole. A pole-by-pole inventory of the number of entities on each pole would be impractical and too costly. The Commission's rules should allow each utility to develop its own presumptive average based on multi-utility (either regional or statewide) utility data. The presumptive average should be updated annually by the utility.

E. Allocating the Cost of Usable Space

. The Commission's current presumption that span wire attachments use one foot of usable space remains appropriate for span wire attachments that occupy no more than one foot of usable space. However, where the attachment occupies more than one foot of space on the pole, the attaching party should be billed in multiples of the attachment rate based on the number of feet or fraction of a foot that the attachment occupies.

F. Use of Utility Easements by Attaching Entities

Right-of-way acquisition costs incurred by the owners of pole structures benefit all non-pole owners who are licensed to attach to the pole. These costs should be included in pole attachment fees. Unlike ILEC right-of-way acquisition costs, electric right-of-way acquisition costs are not reflected in the electric pole investment accounts and, thus are not reflected in electric pole attachment rates. Electric utilities should be allowed to recover right-of-way acquisition costs by adjusting their pole investment accounts to reflect these costs.

III. Preference For Negotiated Agreements

Section 224(e)(2) of the Telecommunications Act states that Commission's regulations "govern charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges." The Commission's NPRM notes that the Commission's role is limited to circumstances "when the parties fail to resolve a dispute over such charges." (NPRM ¶ 12) NYEU support the Commission's statement that its rules governing charges become applicable only after a party seeking to attach and the utility attempt to negotiate the rates, terms, and conditions of a pole attachment agreement and reach an impasse.

NYEU ask the Commission to recognize explicitly in its Order in this proceeding that the rate formula it adopts should not be viewed as the exclusive approach for achieving just and reasonable attachment rates. Pole attachment agreements address more than rates alone; agreements also include terms and conditions which can substantially impact the determination as to whether an agreement is just and reasonable. In reviewing

a complaint of unjust or unreasonable rates, terms, or conditions, the Commission should examine the negotiated rates, terms, and conditions as an integrated whole in order to determine whether the agreement as a whole is unjust or unreasonable.

When parties are unable to reach agreement on rates, terms, and conditions and a complaint is filed with the Commission, the responding party should be permitted to explain how its proposed terms and conditions produce a just and reasonable agreement. NYEU support the Commission's proposal (NPRM ¶12) that a complainant include a brief summary of all steps taken to resolve its dispute before filing a complaint. We believe that this requirement will encourage parties to engage in good faith negotiations that seek to accommodate each party's needs rather than adhere to formulaic conventions to determine just and reasonable terms and conditions.

IV. Attachment Space Use

Section IV of the NPRM seeks comment on a number of issues related to the use of attachment space by the original licensed attacher and by third parties.

A. Overlapping Issues

NYEU agree with the Commission that telecommunication carriers should be permitted to overlap their existing licensed attachment with additional fiber or copper cable. However, the NPRM does not address the pole engineering and notification issues raised by such activity. Overlapping imposes additional burdens on the pole, e.g., extra weight and additional surface for wind and ice accumulation. The carrier must provide the utility-pole owner with reasonable advance notice of its intent to overlap and cooperate with the utility's reasonable engineering requirements related to the additional

burden on the pole and appropriate make-ready work. The Commission should recognize that pole attachment agreements may include a requirement of advance notice of overlashing and cooperation in addressing engineering concerns.

Third parties (i.e., entities that do not have a pole attachment agreement with a utility) should be permitted to overlash to an existing licensed attachment because overlashing promotes telecommunications competition. By avoiding the rearrangement of existing facilities on the pole, the installation of a new messenger (support wire), and, in some cases, the installation of a higher pole, to accommodate the new attachment, overlashing reduces carrier installation costs and efficiently creates more capacity.

However, as with an overlash by a existing attacher, the utility should receive advance notice of an overlash by a third party, and the existing attacher and the overlashing party must cooperate with the utility in addressing engineering concerns. In addition, third party overlashers must enter an attachment agreement with the utility to establish the rates, terms, and conditions for overlashing. An agreement is required to address many of the same issues covered by an original use agreement. These would include nature and extent of pole-use license, make-ready work, attachment rates, maintenance of facilities, liability and insurance, term and facility removal.²

A third party that overlashes on an existing attachment should be required to pay a full attachment rate (i.e., a usable space charge and an unusable space charge) to the utility. This is because the overlashing party receives the full benefits of an attachment and should not gain a competitive advantage by avoiding the attachment rate paid by other

² NYEU do not believe that there are differences between the lines of cable systems and those of telecommunications carriers that warrant a difference in treatment between overlashing by cable systems and telecommunications carriers.

attachers to obtain these benefits. In essence, the third party overlash is a substitute for a separate attachment. While the third party benefits from going the overlash route by avoiding many of the make-ready charges and installation costs that would come with a separate attachment, it should not be exempt from the ongoing charge other attachers pay for attaching their facilities to the pole. Moreover, the sharing of unusable space cost with the overlashing party would foster competition by reducing the attachment rate paid by existing attachers.

Overlashing creates significant additional burdens related to administering multiple occupancies on the pole for which the utility should be compensated by a full attachment charge. These burdens include tracking and recording new overlashes, field visits to determine ownership of overlashed facilities, and general attachment administration. Compensation for these costs and contribution to overall pole costs should not be avoided when attachers resort to third party overlashing. While overlashing is an efficient substitute for a separate attachment, it would be unfair to the utility to make it a cost-free substitute.

While it might be argued that the usable space component of the attachment rate should not be charged because an overlash does not require additional use of usable space, limiting the overlash charge to an unusable space charge would be inappropriate because of the financial impact on the utility. The utility would not gain revenues overall from the unusable space charge because the unusable space charge paid by other attaching parties would be commensurately reduced.

If pole owners are not permitted to collect a full attachment rate from third party overlashers, NYEU believe that the pole owner's administrative burden should be

minimized by requiring that the original attacher, who owns the messenger that supports the overlashed facility, own the entire overlashed bundle and undertake all administrative responsibilities for overlashed facilities on its wire messenger.

If a full attachment rate is charged for the overlash, the overlash should be considered a separate attachment from the original attachment. The application of either the cable or the telecommunications attachment rate to each line in the overlashed bundle would depend on the nature of the services (solely cable service or telecommunications service) provided by each individual line.

If one party owns the entire overlashed bundle, it should pay a single attachment rate for the entire bundled overlash, but overlashing by a telecommunications line over a cable television service line, or vice versa, would require that the telecommunications rate be applicable. This would prevent cable service providers from circumventing the intent of Section 224 (d)(3) that attachments used for telecommunication purposes pay the telecommunication attachment rate.

B. Use of Dark Fiber

NYEU do not view the use of dark fiber leased from a licensed attacher as an additional attachment. Whether the dark fiber is within the original attachment or in an overlash, the use of spare capacity within an existing attachment does not entail the placement of additional facilities on a pole. Therefore, the use of dark fiber by a third party should not be subject to an attachment charge. An entity that has communications fiber attached to a pole or conduit should have the right to lease or license the use of such fiber to a third party without having to pay an additional attachment charge, and the third party should have the right to use the fiber without having to pay an attachment charge.

Pole attachment agreements should not limit the attacher's ability to lease dark fiber or require the attacher or the third party to compensate the utility when dark fiber is leased. However, where third parties that use dark fiber require physical access to the pole or conduit for maintenance or other purposes, the terms and conditions of such access must be established in an agreement between the utility and that third party. Physical access raises issues between the utility and the third party, such as liability and training, that require resolution in writing before third party forces can be permitted to have physical access to the pole.

The lessor of dark fiber should continue to pay a single attachment rate, but the use of the leased dark fiber for telecommunications service would require that the telecommunications rate be charged even if the lessor used the remainder of the fibers for cable television services. An attacher who leases dark fiber to a third party can recover any increased attachment charge through appropriate provisions in its lease with the third party. This would prevent cable service providers from circumventing the intent of Section 224 (d)(3) that attachments used for telecommunication purposes pay the telecommunication attachment rate.

V. Charges for Attaching

In section V of the NPRM, the Commission seeks comment on implementing certain presumptions to establish the telecommunications rate, allocating the cost of "other than usable space," and allocating the cost of usable space.

A. Pole Height and Usable Space Presumption – Summary of NYEU Position

In paragraph 17 of the NPRM, the FCC seeks comment on whether the Commission's current pole height and usable space presumptions, currently applicable for setting the cable rate, should also be applicable to attachments made by telecommunication carriers. NYEU believe that the FCC should continue its presumption -- derived from the use of 35 and 40 foot poles for attachments -- that the average pole height is 37.5 feet. In determining the usable space on a pole, the FCC should adjust its current presumptions of 11 feet of usable space on a 35 foot pole and 16 feet of usable space on a 40 foot pole by excluding 30 inches of the 40 inch safety space that is included in the FCC's current usable space presumption. With the 30 inch safety space excluded from usable space, the presumed usable space on a 35 foot pole would be 8.5 feet (11 feet - 2.5 feet), and the presumed usable space on a 40 foot pole would be 13.5 feet (16 feet - 2.5 feet). Therefore, the presumed average amount of usable space on a pole would be 11 feet (13.5 feet - 2.5 feet). The 30 inches of safety space should be considered to be unusable space with the cost to be shared by all parties on the pole according to the formula for allocating the costs of unusable space. The remaining 10 inches of safety space would be usable space chargeable to the electric utility.

B. The Formula for Determining the Usable Space Presumption

The sponsors of the Whitepaper, discussed in paragraph 17 of the NPRM, propose that the calculation of usable space be based on use of a 40 foot pole for attachments. The sponsors assert that the average pole height has increased to 40 feet and claim that the usable space on 35 foot poles should no longer be factored into the calculation of usable space. Even assuming an increase to 40 feet in the average height of a pole used for

attachments,³ NYEU disagree that the calculation of usable space based should be based solely on an average 40 foot pole. The Whitepaper approach ignores the fact that 35 foot poles continue to be used for attachments and have considerably less usable space than 40 foot poles. Any presumption of usable space should reflect a blend of the usable space on each type of pole used for attachment.

In the FCC's Second Report and Order in Matter of the Adoption of Rules for the Regulation of Cable Television Pole Attachments, CC No. 78-144, May 23, 1979, 72 FCC 2d 59 ("CATV Second Report and Order"), the Commission did not rely on average pole height to calculate its usable space presumption. The FCC developed its usable space presumption in a three-step process. First, the Commission determined the height of the poles primarily used for attachments. Next, it determined the amount of usable space on each of those pole heights. Lastly, it calculated the usable space presumption by finding the arithmetic average of the usable space for each pole height. The Commission stated (id., at 69):

[T]here was a consensus that the most commonly used poles are 35 and 40 feet high, with usable spaces of 11 and 16 feet, respectively . . . we . . . will permit utilities the option of assigning the arithmetic average of the usable space of 11 and 16 feet, viz., 13.5 feet, as the amount of usable space per pole for those poles used for CATV attachments. We believe that this figure represents a reasonable assignment of usable space regardless of pole height and will better serve Congress' intent that the Commission develop "a flexible program . . . [that is] simple and expeditious."

³ The Whitepaper sponsors do not provide any data, such as a survey of poles actually used for attachments, to support their belief that the average pole height is 40 feet.

By contrast, the Whitepaper derives its proposed presumption of usable space from only a 40 foot pole. The Whitepaper asserts that 40 feet is the average of the 35, 40, and 45 foot poles most commonly used today for attachments and erroneously presumes that the usable space on a 40 foot pole is the equivalent of the arithmetic average of the usable space on 35, 40, and 45 foot poles.

The Commission has found that there is 11 feet of usable space on a 35 foot pole and 16 feet of usable space on both 40 and 45 foot poles.⁴ The arithmetic average of usable space on the three pole heights is lower than (not equivalent to) the usable space on a 40 foot pole. Thus, the Whitepaper's use of the usable space on a 40 foot pole as the basis for the calculation of a usable space presumption causes its calculation of usable space to be too high.

The Commission's approach to establishing the usable space presumption, adopted in the CATV Second Report and Order, should be continued. The usable space presumption should be the average of the usable space for each of the heights of poles actually used for attachments.

NYEU does not believe that circumstances have changed sufficiently since the Commission issued the CATV Second Report and Order to warrant a change in the Commission's use of 35 and 40 foot poles to derive its usable space presumption. In the CATV Second Report and Order, the FCC observed that many utilities informed it that they also use 45 foot poles for attachments. It stated, "[M]ost other parties reported that

⁴ In the CATV Second Report and Order, the Commission stated, "Most other parties reported that they rely primarily on 35 foot poles with 11 feet of usable space, and 40 and 45 foot poles with 16 feet of usable space" (*id.*, at 68). In the FCC's Memorandum Opinion and Order in Matter of the Adoption of Rules for the Regulation of Cable Television Pole Attachments, CC No. 78-144, March 10, 1980, 77 FCC

they rely primarily on 35 foot poles with 11 feet of usable space, and 40 and 45 foot poles with 16 feet of usable space” (id., at 68). The Commission, nevertheless, opted to use 35 and 40 foot poles to determine the usable space presumption.

In its CATV Memorandum and Order addressing petitions seeking reconsideration of the CATV Second Report and Order (77 FCC 2d 187), the Commission defended its use of 35 and 40 foot poles by pointing out that the presumption is rebuttable and that parties who can make a case for using other pole heights may do so. The Commission stated that the usable space presumption (id., at 191-92)

does not, however, preclude the utility from submitting the actual usable space per pole if it so desires, nor conversely, preclude the cable company from rebutting the [presumption]. . . Moreover, we have built enough flexibility into our procedures so that a utility may present its own weighted average if its usage differs significantly from our [presumption].

The Whitepaper sponsors have made no showing that the use of 45 foot poles has increased nationwide so as to warrant the addition of a 45 foot pole as the third leg of the Commission’s usable space calculation. To the extent that any utility believes that the weighted average of its poles warrant a result significantly different from Commission’s usable space presumption, it may present that result to the Commission for use in its attachment rate.

C. Safety Space Should Be Classified As Non-Usable Space

The Commission proposes to continue its traditional approach to safety space by considering “that the safety space emanates from a utility’s requirement to comply with

2d 187 (“CATV Memorandum Opinion and Order”), the Commission stated, “[I]t should be noted that generally both 40 and 45 foot poles have a usable space of 16 feet.” Id. at 193, n9.

the National Electric Safety Code ("NESC") and should properly be assigned to the utility as part of its usable space." (NPRM ¶ 20). NYEU urge the Commission to reconsider this position. While the Commission is correct in recognizing that the electric utility requires safety space as part of its usable space, the Commission assigns too large a portion of the safety space to the electric utility. When the safety space requirement is correctly analyzed, ten inches of safety space should be assigned as part of the electric utility's usable space and thirty inches of safety space should be assigned to unusable space.

1. Allocation of Safety Space

The NESC contains industry standards for the safe and efficient use of poles supporting electric and communications facilities. Addressing clearances that must be maintained between line conductors horizontally affixed to a pole (i.e., so-called "span wire"), the NESC requires that the communication span wire attachments be separated from the electric span wire attachments a distance of at least 40 inches at the point of the attachment to the pole. That separation requirement is intended to provide a safe mid-span separation of the facilities of 30 inches.⁵

⁵ 1997 NESC Rule 235 C 2 b states:

b. Sag-Related Clearances

(1) Line conductors supported at different levels on the same structures shall have vertical clearances at the supporting structures so adjusted that the clearance at any point in the span shall be not less than any of the following. For purposes of this determination, the upper conductor shall be at either final sag at the maximum temperature for which the conductor is designed to operate, or at final sag with radial thickness of ice, if any, specified in Rule 250B for the loading district concerned, whichever produces the greater sag. The lower conductor shall be at final sag under the same ambient conditions as the upper conductor, without electrical loading, and without ice loading.

EXCEPTION: This rule does not apply to conductors of the same utility when the conductors are the same size and type, and are installed at the same sag and tension.

In actual practice, the separation at the pole often exceeds 40 inches in order to meet the 30-inch separation requirement at mid-span. That situation arises as a result of the differing sag requirements of electric and communication facilities. For example, many jointly used poles today have lightweight fiber optic cable with very little sag as the uppermost communications facility. This typical configuration requires that electric span wire attachments with sags greater than 10 inches⁶ be placed more than 40 inches on the pole above the lightweight fiber optic cable. Only in this way can the 30-inch mid-span separation requirement be maintained.

The above example illustrates that the one constant in any configuration of sags is the 30-inch mid-span separation requirement. Regardless of whether there is a heavyweight electric conductor and a lightweight uppermost communications wire, or the weight characteristics of the wire are exactly the opposite, that 30-inch mid-span separation requirement always controls. Under these circumstances, it makes no sense to quantify safety space by reference to the distance between facilities on the pole because that figure will vary. In determining safety space, the point of demarcation on the pole between usable and unusable space should be where the mid-span clearance intersects the pole because any space above that point is effectively "used" by the electric facility to the exclusion of any other use and should be considered usable space allocated to the electric

(a) For voltages less than 50kV between conductors, 75% of that required at the supports by Table 235.5.

Thus, the 40 inch safety space is designed to result in 30 inches of mid-span clearance (40 x .75). The code does permit a 30-inch separation at the point of support and a 12-inch mid-span separation under certain limited conditions.

⁶ The difference between the 40-inch separation requirement on the pole and the 30-inch separation at mid-span.

utility. As such, NYEU propose that safety space should be calculated at 30 inches consistent with the NESC mid-span requirements.

2. *Classification of Safety Space As Unusable Space*

Safety space equally serves and benefits all entities attaching to a pole. The costs of safety space should, therefore, be shared by attaching entities. Safety space is required to provide a protection zone between telecommunications facilities and electrical lines for the safety of employees with access to the poles and the span between the poles. The safety space is used only to provide a safe working environment for the workers of all telecommunications and electrical companies using the pole line route in accordance with the provisions of the NESC.

In the CATV Second Opinion and Order, the Commission recognized the equitable appeal of allocating safety space among all attaching entities, but found that three considerations counterbalanced that approach. The Commission stated:

Since all users benefit from the inclusion of 40 inches of unused space below the power lines in terms of safety to their employees, allocation of the safety space based on space actually used may seem at first blush to be an equitable approach. However, for several reasons we conclude otherwise. Firstly . . . Assigning any portion of the safety space to CATV would contravene the clear intent of Congress that CATV be responsible only for the space it actually occupies, i.e., one foot. Secondly, we must recognize the significance of an important risk taken by CATV operators . . . [Pole attachment] agreements generally make the CATV operators responsible for all pole replacement costs necessitated by the subsequent installation of additional electric or telephone lines that reduce available safety space to less than 40 inches . . . the risk for maintaining this safety space effectively falls squarely on the CATV operator.

Therefore, it is difficult to accept, in equity, arguments that seek to further assign part of the 40 inch safety space to the CATV operator. Thirdly, we note the common practice of electric utility companies to make resourceful use of this safety space by mounting [electrical equipment]. . . the 40 inches does appear to be of practical benefit to the electric utility.

72 FCC 2d at 70-71.

NYEU believe that the Commission's three reasons for rejecting a sharing of safety space costs are not applicable to the attachment rates for telecommunications carriers being established in this proceeding. The first reason – Congress' intent to limit CATV responsibility to one foot of usable space – does not pertain to telecommunication carriers. Section 224 (e) states the formula for the telecommunications attachment rate and does not limit telecommunication carrier responsibility to a particular amount of space. Instead it provides that telecommunication carriers will be responsible for "the percentage of usable space required for each entity" and share equally in two thirds of the costs of unusable space on the pole.

The second reason – CATV operators' responsibility for pole replacement costs needed to maintain a 40 inch safety zone – has been eliminated by an amendment to Section 224 made by the Telecommunications Act of 1996. Section 224 (i), as amended, states that an attaching party

shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole . . .)

NYEU disagree with the Commission's third reason, i.e., that safety space is "usable space" because the utility sometimes put this space to resourceful use for non-span wire facilities. Section 224 (d)(2) defines "usable space" in terms of use for the attachment of span wire facilities ("wires, cables, and associated equipment"), and the attachment of non-span wire facilities, such as street light support brackets and transformers, is outside of that definition.

In the closely analogous area of ground clearance space, the Commission has always considered the ground clearance space on a pole to be unusable space even though there is similar resourceful use of ground clearance space for CATV and telecommunication power supplies and terminal boxes. The Commission should recognize that safety space has the same characteristics as ground clearance separation space. The functions of safety space and ground clearance space are quite similar. Both provide a separation zone from span wire facilities in order to furnish protection from those facilities. At the same time, both are put to resourceful use for the attachment of non-span wire facilities. This similarity of function argues strongly that safety space and ground clearance space should be treated similarly in setting pole attachment rates. Just as ground clearance space is considered to be unusable space, safety space should also be considered to be unusable space.

NYEU, thus, believe that the safety space is unusable space for purposes of span wire attachments and that two thirds of the costs of safety space should be apportioned among the attaching entities.

It is noteworthy that the ILECs and the electric utilities in their capacity as pole owners historically have recognized that the safety space is needed by both

telecommunications and electric utility attachees and have, therefore classified it as unusable space in apportioning costs between themselves.⁷ The telecommunications attachment rate that the Commission establishes in this proceeding should recognize this traditional treatment of safety space and classify safety space as unusable space.

Nevertheless, if the Commission continues to consider safety space to be usable space, then 30 inches of safety space should be chargeable pro rata to all attaching entities as usable space required for their attachment, and the percentage of usable space for each attaching entity should be based on this pro rata share of safety space plus the space occupied by its attachment. For example, if there were three attaching entities, each would be charged with 10 inches of safety space in addition to the twelve inches of usable space occupied by its attachment. This approach would reasonably implement the requirement in section 224 (e)(3) that the “usable space required for each entity (emphasis supplied)” is to be used to establish its percentage share of usable space costs. Safety space is required for each attachment to a pole with electric wire facilities; each attacher’s usable space percentage should reflect its pro rata share of the safety space requirement.

D. Allocating The Cost Of Other Than Usable Space

1. Unusable Space Allocation to the Utility

With regard to “unusable space”, Section 224(e)(2), states that two thirds of the costs of providing space on a pole duct or conduit, other than usable space is to be

⁷ The agreements between the pole-owning entities in New York State -- ILECs and electric utilities -- currently provide for a sharing of the costs of a jointly used pole, including the safety space. This cost sharing is determined by the pole ownership ratio ("POR"), ranging typically from a ratio of 40/60 to a ratio of 50/50, provided in such agreements. The POR provides a balanced, equitable sharing of pole costs, including safety space, that takes into consideration on a global basis the multitude of responsibilities borne by pole owners.